Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-658

ASARCO INCORPORATED (formerly The American Smelting and Refining Company), *Appellant,*

v.

MONTANA DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, *Appellee.*

On Appeal from the Supreme Court of Montana

APPENDIX

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APPENDIX A

No. 13249

IN THE SUPREME COURT OF THE STATE OF MONTANA

1977

MONTANA DEPARTMENT OF REVENUE, STATE OF MONTANA,
Petitioner and Appellant,

— vs —

THE AMERICAN SMELTING AND REFINING COMPANY,
Defendant and Respondent.

Appeal from: District Court of the First Judicial District, Honorable Peter Meloy, Judge presiding.

Counsel of Record:

For Appellant:

Terry B. Cosgrove argued, Helena, Montana
Theodore W. DeLooze argued, Salem, Oregon

For Respondent:

Hughes, Bennett and Cain, Helena, Montana
George T. Bennett argued, Helena, Montana
Charles Smith, Helena, Montana

For Amicus Curiae:

William D. Dexter appeared, Olympia, Washington

Submitted: January 27, 1977
Decided July 11, 1977

Filed: July 11, 1977

/s/ THOMAS J. KEARNEY
Thomas J. Kearney
Clerk

Mr. Chief Justice Paul G. Hatfield delivered the Opinion of the Court.

This is an appeal by the Montana Department of Revenue (DOR) from a judgment entered in the district court, Lewis and Clark County, affirming a final decision of the State Tax Appeal Board (STAB). The STAB decision ordered a recomputation of the deficiency assessment levied by DOR against American Smelting and Refining Company (ASARCO).

In 1972 the auditors of the Multistate Tax Commission conducted an audit of ASARCO's records for the tax years 1967-1970. Subsequent to this audit, additional corporation license taxes were assessed against ASARCO by DOR. The amount of this deficiency assessment is the underlying issue upon appeal.

ASARCO is a New Jersey corporation engaged in national and international operations in the business of mining, smelting, refining, manufacturing, buying and selling nonferrous metals and minerals. ASARCO basically engages in two separate, but related areas of operation. The first is a primary metal operation consisting of the mining, milling, smelting and refining of nonferrous metals. The second is a nonferrous alloy operation consisting of the manufacture and sale of alloy products.

For the tax years in question ASARCO owned mines in Colorado, Washington, Arizona, New Mexico and Idaho in addition to mines in Canada and other foreign countries. It operated smelters and refineries in Texas, Maryland, Colorado, Montana, Missouri, Arizona, Nebraska, New Jersey, Washington and California for the years in question. Alloy manufacturing plants were located in Texas, New Jersey, California, Oklahoma and Indiana. ASARCO sales offices were located in New York, Baltimore, Boston, Cincinnati, Cleveland, Detroit, Milwaukee, Philadelphia, Rochester and St. Louis.

ASARCO owns and operates a smelter in East Helena which is its principal operation in Montana. This smelter receives lead ores and concentrates from company mines as well as unrelated suppliers. The smelted, but unrefined lead product is then shipped to other units of ASARCO for further treatment and eventual sale. Anaconda Company purchased various by-products of the East Helena smelter for the years in question. In addition to the East Helena smelter ASARCO owns certain active and inactive mining properties in Montana.

Prior to 1962 ASARCO reported its income from its Montana properties by separate accounting, pursuant to section 84-1503, R.C.M. 1947. Under that method ASARCO determined the gross receipts from its Montana properties and deducted all expenses incurred by or attributable to such properties to arrive at Montana income. Where overhead expenses such as the cost of transportation were attributable to more than one state, they were apportioned to determine the Montana portion.

In 1962 ASARCO recognized that its business was unitary in nature and it could no longer use separate accounting for its income. Pursuant to section 84-1503 it requested permission from DOR to change from separate accounting to the unitary method of accounting. Permission was granted by DOR and a "hybrid" system of reporting income was instituted. Under this hybrid system, all but a negligible amount of total company income from rents, royalties, dividends, interest and sales of tangible and intangible properties was allocated to sources outside Montana. After deductions for the allocated income, ASARCO's operating net income was apportioned to Montana sources by the use of a three factor formula.

An in-depth examination of ASARCO's hybrid system indicates the following procedure was used to compute tax liability for the years in question. ASARCO classified the income listed below as nonbusiness income under

DOR's 1967 regulations, deducted it from its apportionable income, and allocated it as indicated:

(a) Income from mine royalties paid by the lessees of ASARCO's Keystone Mine previously operated by ASARCO and located in the State of Colorado was allocated to the State of Colorado;

(b) Income from patents and copyrights on items developed by ASARCO's research department and used in ASARCO's operations and licensed to others, was allocated to commercial domicile;

(c) Income from rental of housing units on mining properties and rented to employes was allocated to the state where such rental units are located:

(d) Interest income from United States obligations, customers notes and bonds, notes on the sale of a plant and General Cable stock, from state and municipal bonds, time certificates, bankers acceptances, and commercial paper was allocated to the state of commercial domicile;

(e) Gains from the sales of tangible properties were allocated to the state of sale;

(f) Dividends paid on stocks were allocated to state of commercial domicile;

(g) Gains from the sale of stock were allocated to the state of commercial domicile; and

(h) Income from securities deposited with Montana state agencies and from money deposited in Montana was allocated to Montana.

The percentage of apportionable income or loss attributable to Montana sources was calculated by the use of this formula:

$$\frac{\text{Montana property}}{\text{Total ASARCO Property}} + \frac{\text{Montana Payroll}}{\text{Total ASARCO Payroll}} + \frac{\text{Montana Sales}}{\text{Total ASARCO Sales}}$$

$$\text{Averaged by dividing by 3} = \text{____\%}$$

The percentage obtained was then multiplied by ASARCO's total apportionable income to determine the Montana contribution.

DOR contends the hybrid system used by ASARCO to calculate its Montana income incorrectly interpreted section 84-1503, R.C.M. 1947. That section at the time in question, stated:

> "If the income of any corporation from sources within the state cannot be properly segregated from income without the state, then, in that event, the amount of the net income returned shall be that proportion of the taxpayer's total net income which the taxpayer's gross business done in the state of Montana bears to the total gross business of the taxpayer, and apportionment shall be made under the rules and regulations prescribed by the state board of equalization, giving consideration to sales, property and payroll and such other factors as may be deemed applicable; provided, however, that the state board of equalization shall, upon the presentation of satisfactory evidence, determine that the income from sources within the state of Montana may be properly segregated from income from sources without the state of Montana and shall allow separate accounting. The board shall publish not less than once a year, all rules and regulations pertaining to this section. All decisions by the board under this section shall be subject to judicial review in an action prosecuted by the corporation in the district court of Lewis and Clark county. The taxpayer cannot change from one method of accounting to another method of accounting without first obtaining permission from the board."

DOR interprets the above statute as creating only two methods of determining income from sources within Mon-

tana—separate accounting or apportionment of total net income. Separate accounting is available only if income from sources within the state may be segregated from sources without the state. In the absence of the above conditions, total business net income must be apportioned.

DOR determined that the income classified by ASARCO as nonbusiness income was, in fact, business income as defined by DOR's 1967 regulations. DOR therefore restored this income to apportionable net income. In addition, DOR included in apportionable net income the net income of six of ASARCO's wholly owned subsidiaries. DOR contends that ASARCO and the six subsidiary corporations were engaged in a unitary business and therefore the combination was merely an extension of the apportionment method of taxation dictated by section 84-1503.

Pursuant to DOR's calculations of ASARCO's Montana income additional corporate license taxes were assessed. Protest was made by ASARCO and a hearing was held before the director of DOR. The director's decision affirmed the deficiency assessment. Thereafter ASARCO appealed to STAB which reversed the director's decision. DOR then petitioned the district court, Lewis and Clark County, requesting a review of the STAB order. On December 17, 1975, the district court entered judgment affirming the decision of STAB. DOR appeals the district court judgment.

Three issues are before the Court upon appeal:

1) Whether DOR had the authority, pursuant to sections 84-1503 and 84-1508, R.C.M. 1947, to adopt its Regulations 1001-1020 (Chapter 10) concerning rules for the apportionment of corporate net income?

2) Whether ASARCO was correct in its deduction of alleged nonbusiness income from apportionable net income prior to apportionment?

3) Whether the income from six of ASARCO's wholly owned subsidiaries was properly included in apportionable net income?

On December 30, 1966, DOR adopted its Regulations 1001-1020 (Chapter 10). These regulations were effective with respect to tax years beginning on and after January 1, 1967. Included within these regulations are specific rules for allocation and apportionment of corporate income derived from sources both within and without Montana. In addition key terms are specifically defined as to their application to the regulations.

The regulations provide for two methods of accounting for income; apportionment according to a three-factor formula and separate accounting. Separate accounting is allowed only in situations where income can be specifically segregated as to source. Apportionment of income must be used in all other cases. The apportionment system adopts what may be categorized as a "business vs. nonbusiness" test in regard to determining what income is apportioned and what income may be allocated to source. Under this system all business income is apportioned by use of the three-factor formula while only nonbusiness income may be allocated to source. Business income is defined as all income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations. Nonbusiness income is defined as all income other than business income.

ASARCO urges these regulations were ineffective as applied to it for the tax years 1967-1970 for two reasons:

1. DOR by virtue of section 84-1503 had the authority to adopt rules and regulations only as to the apportion-

ment of such income as could not be segregated as to source.

2. The regulations adopt a "business vs. nonbusiness" income test rather than the "source" of income test found in section 84-1503 and are therefore fatally inconsistent.

Any contention that DOR lacks the authority to adopt rules and regulations interpreting taxation statutes is without merit. In regard to the statute in question, the power to adopt rules and regulations is clearly and unambiguously stated within the text of the statute. Furthermore section 84-1508, R.C.M. 1947, gives DOR power to provide "such other regulations as may from time to time be found necessary." We affirmed this principle in State ex rel. Fulton v. District Court, 139 Mont. 573, 366 P.2d 435.

The crux of this entire case is the interpretation of section 84-1503 and DOR Regulations 1001-1020. There is no merit in ASARCO's contention that DOR has only authority to adopt rules and regulations for the apportionment of income incapable of segregation as to source.

The function of the Supreme Court when construing a statute is simply to ascertain and declare what is in substance stated therein, and not to insert what has been omitted or to omit what has been inserted. Dunphy v. Anaconda Co., 151 Mont. 76, 438 P.2d 660; In re Transportation of School Children, 117 Mont. 618, 161 P.2d 901; Section 93-401-15, R.C.M. 1947. The fundamental rule of statutory construction is that the intent of the legislature controls. Matter of Senate Bill No. 23, Chapter 491, Montana Session Laws of 1973, 168 Mont. 102, 540 P.2d 975, 32 St. Rep. 954; Hammill v. Young, 168 Mont. 81, 540 P.2d 971, 32 St.Rep. 935; Dunphy v. Anaconda Co., supra; Section 93-401-16, R.C.M. 1947. Where the intent of the legislature can be determined from the

plain meaning of the words used, the courts may not go further and apply any other means of interpretation. State ex rel. Huffman v. District Court, 154 Mont. 201, 461 P.2d 847; Dunphy v. Anaconda Co., supra. Here, the plain meaning of the words used by the legislature unmistakably discloses its intent. DOR clearly has the authority to adopt rules and regulations as to the apportionment of corporate income without regard to source.

There also is no merit in ASARCO's second contention. ASARCO argues that section 84-1503 contains a "source of income" test to be used in determining apportionable income vs. allocatable income. ASARCO concludes that this apparent conflict with the business vs. nonbusiness income test found in the regulations makes the regulations ineffective as applied to ASARCO. As support for its theory of inconsistency between the statute and the regulations, ASARCO points out that section 84-1503 was amended in 1974, and the amended statute conforms to the regulations.

In the construction of an amendatory act it will be presumed that the legislature, in passing it, intended to make some change in the existing law, and therefore the Court should endeavor to give effect to the amendment. Pilgeram v. Hass et al., 118 Mont. 431, 167 P.2d 339; Nichols v. School District No. 3, 87 Mont. 181, 287 P.624. However, this presumption of change is not conclusive. This Court stated in School District No. 12 v. Pondera County, 89 Mont. 342, 297 P. 498, that a change in a statute may be made merely to express more clearly the original intent of the legislature. Such is the case here. The unamended statute is not a model of clear draftmanship in regard to guidelines for the apportionment of corporate income. DOR therefore adopted Regulations 1001-1020 to provide clear guidelines for taxpayer compliance. The legislature thereafter saw fit to clarify the section by the 1974 amendment to section 84-1503. The

unamended version of section 84-1503 is not in conflict with the regulations and therefore ASARCO must report its income in compliance with those regulations.

Regarding ASARCO's second issue, we find the hybrid system of reporting income used by ASARCO to be invalid under section 84-1503. As above, the crux of this issue is the interpretation of section 84-1503 and Regulations 1001-1020. The intent of the legislature in regard to the determination of what income is apportionable income is clear and unambiguous. Section 84-1503 provides for two methods of accounting for income; separate accounting and apportionment.

Section 84-1503 provides a test for the determination of the correct method of accounting to be used by a corporation in reporting its Montana corporation license tax. If income from all sources within Montana can "be properly segregated from income without the state" then and only then, may the separate accounting method be used. Furthermore if the separate accounting method is applicable, total net income must be allocated to source rather than the hybrid system used by ASARCO.

ASARCO recognized its business was unitary in nature in 1962. It requested and was granted permission by DOR to discontinue the separate accounting system then in use. Hence both parties agree that ASARCO must apportion its income and the question becomes what income is included in apportionable net income.

The regulations are clear and simple. All business income is apportionable and nonbusiness income is allocated to source. ASARCO argues that certain items of income listed above are nonbusiness income and therefore properly deductible from apportionable net income. This contention is incorrect.

The regulations state that business income includes income derived from tangible and intangible property if the

acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operation. After an in-depth examination of the income in question, we find this income is derived from sources that are integral portions of its business. This finding is in direct conflict with the district court's finding of fact which state this income is nonbusiness income. The test of whether this income is in reality business or nonbusiness income is a matter of statutory interpretation. We feel therefore that the finding of the district court is in error. We are confronted herein with a conclusion of law, rather than a finding of fact. Listed below are examples of the relationship of this alleged nonbusiness income to ASARCO.

1) Royalty Income—The royalty income arose from two sources, mine royalties and patent royalties. The mine royalties arose when ASARCO leased its Keystone mine in Colorado to an unrelated mining concern. ASARCO had operated this mine prior to the leasing. The royalty was computed on the basis of mine production. The patent income arose from royalties paid for the use of devices developed by ASARCO's research department. These devices were developed initially for ASARCO's use in its various plants and mines. The main item included herein was a vertical feed furnace.

2) Rental Income. The majority of this income is derived from homesites rented to employees working near ASARCO mines and plants. Mr. Pecca, an ASARCO official, testified at the DOR hearing:

> "This is the, it's almost exclusively rents received from employees working at the company mines which are located in remote areas and the company is required to provide houses."

3) Interest Income—The interest income arose from customers' notes on bonds, U.S. government notes, notes

taken on the sale of a plant and stock, state and municipal bonds, and time certificates and other commercial paper. All were clearly liquid securities and were therefore readily available for use in meeting company obligations and debts.

4) Gains on the Sale of Stock—ASARCO bought and sold stock in various corporations during the years in question. Included within the sales were stock of General Cable, Revere Copper, Kennicott Copper, and Hecla Mining Company. These corporations are all engaged in the business of either producing metal ore or manufacturing the refined product into goods. The stock was used by ASARCO for business purposes, such as gaining access to raw materials or access to potential customers for its refined metals. Therefore all the above income was generated by the unitary business operation of ASARCO.

The concept of including income from the sale of tangible and intangible property and income derived from rents, royalties and interest within apportionable net income is not new nor unique. In Sperry and Hutchinson Co. v. Department of Revenue, 270 Or. 329, 527 P.2d 729, 731, short term securities held to satisfy the need for liquid capital were held to be apportionable. The Oregon court stated:

> "S & H argues that because this income is the return on an intangible it must be allocated to legal situs. Nothing in our former law requires such an arbitrary result and our current law expressly prohibits it." 527 P.2d 731.

The current law referred to by the Oregon court is in pertinent part identical to the DOR regulations here in question. A similar result dealing with short term intangibles was reached in Montgomery Ward & Co., Inc. v. Comm. of Taxation, 276 Minn. 479, 151 N.W.2d 294.

In Cleveland-Cliffs Iron Co. v. Michigan Corporation and Securities Commission, 351 Mich. 652, 88 N.W.2d 564, 572, the issue was whether an investment portfolio containing certain steel stocks should be included in determining the book net worth of the corporation. The court held the stocks were closely related to the company's business, quoting with approval from Flint v. Stone Tracy Company, 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389:

> "Nor can it be justly said that investments have no real relation to the business transacted by a corporation. The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige." 88 N.W.2d 572.

See also: Great Lakes Pipe Line Co. v. Commissioner of Taxation, 272 Minn. 403, 138 N.W.2d 612.

Concerning the final issue, DOR is correct in its contention that net income and apportionment factors of six of ASARCO's wholly owned subsidiaries must be included in ASARCO's computation of apportionable net income. This is merely an extension of the unitary method of taxation. Simply stated, the traditional concept of a combination of various units of a corporation for unitary method tax computation is extended to a combination of various related or affiliated corporations.

In the instant case, the six affiliated corporations are clearly separate and distinct from ASARCO. However all are wholly owned by ASARCO and share common members of their respective boards of directors with ASARCO. A close relationship exists between ASARCO's business operation and the subsidiaries in that the sub-

sidiaries all provide ASARCO with material, services, or a market for its products. From the discussion of the individual corporation's operations listed below, it is clear the corporations are dependent upon each other and each in turn contributes to the other's business success.

1) Federated Metals of Canada—Federated Metals is a Canadian corporation which basically operates the same business in Canada as ASARCO's American operation. ASARCO provides Federated with certain central services such as operations technology and accounting and financial services. In addition, sales between the two corporations are significant.

2) ASARCO Mercantile Company—ASARCO Mercantile is engaged solely in the purchase and sale of machinery for ASARCO's subsidiaries. All central services are provided by ASARCO.

3) Enthone, Inc.—Enthone is a Connecticut corporation engaged in the manufacture and sale of metal finishing chemicals and supplies used in metal plating. About 16% of Enthone's raw materials were purchased from ASARCO. Central services were provided by ASARCO.

4) International Metal Company—This company is ASARCO's exclusive sales outlet for materials delivered to foreign countries. ASARCO provides all central services.

5) Lone Star Lead Construction Co.—Lone Star is a Texas corporation engaged in lining tanks with lead for protection against corrosive contents. The vast majority of its lead requirements are purchased from ASARCO.

6) Northern Peru Mining Co.—All production from Northern Peru's mines are sold to ASARCO and refined in its plants.

In addition to the foregoing, Mr. Pecca testified as to other services provided by ASARCO to all its subsidiaries. These include:

1. ASARCO handles central insurance of the subsidiaries.

2. Services provided by ASARCO are billed to the subsidiaries, including top management.

3. All United States and state returns are prepared by ASARCO for the subsidiaries.

4. Legal services are provided by ASARCO for the subsidiaries whenever necessary.

5. Essential capital is provided for the subsidiaries, who do not go to outside sources without first going to ASARCO.

Coca Cola Company v. Department of Revenue, 271 Or. 517, 533 P.2d 788, 790, 792, is on all fours with the instant case. There the Oregon court said:

> "The principal issue in this case is whether the income from Coca Cola and its wholly owned subsidiaries may be combined and the apportionment formula applied to the sum to determine the income properly attributable to Oregon." 533 P.2d 790.

The Oregon court first stated that in order to properly combine the incomes of the parent and subsidiary, the business operation must be unitary. The unitary test was defined as whether the business units, or in this case corporations, are dependent upon each other and contribute to the operation of the other's business. Zale-Salem, Inc. v. Tax Com., 237 Or. 261, 391 P.2d 601. Un-

questionably this test is met in the instant case. The Oregon court in *Coca Cola Company* then stated:

> "We must now decide whether the fact that Coca Cola and its wholly owned subsidiaries are organized as separate corporate entities precludes the Department of Revenue from combining their incomes to reflect the true character of their unitary business. We hold that it does not." • • •
>
> "The question is fundamentally one of whether a business should stand in a better position for purposes of determining income merely because it chooses to use a multiple corporation organizational scheme. We do not feel that it should. We agree with the following statement of the California Supreme Court:
>
> "' • • • [A]ccepting, as we must, the application of the law to unincorporated wholly controlled branches or businesses located in other jurisdictions as set forth in Butler Brothers v. McColgan, 17 Cal.2d 664, 111 P.2d 334; Id., 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991, the conclusion is irresistible that the same rule should apply to incorporated wholly controlled branches or businesses so located. • • •' Edison California Stores v. McColgan, supra at 473-74, 183 P.2d at 17."

The decision of the district court is reversed. This case is remanded to the district court with instructions to

enter judgment in favor of the Montana Department of Revenue in the amount of the original deficiency assessment.

/s/ [illegible]
Chief Justice

We concur:

/s/ GENE B. DALY
Gene B. Daly
/s/ JOHN CONWAY HARRISON
John Conway Harrison
/s/ FRANK I. HASWELL
Frank I. Haswell
/s/ DANIEL J. SHEA
Daniel J. Shea
Justices

IN THE SUPREME COURT OF THE STATE OF MONTANA

(Caption Omitted in Printing)

Order

[FILED AUGUST 11, 1977]

PER CURIAM:

Having considered respondent's petition for rehearing in the above named cause,

IT IS ORDERED that the petition for rehearing is hereby denied for the reasons stated in appellant's objections to respondent's petition for rehearing.

DATED this 10th day of August, 1977.

/s/ [ILLEGIBLE]
Chief Justice

/s/ JAMES CONWAY HARRISON

/s/ FRANK I. HASWELL

/s/ DANIEL J. SHEA

Justices

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS & CLARK.

No. 37750

MONTANA DEPARTMENT OF REVENUE, STATE OF MONTANA,
Petitioner,

vs.

THE AMERICAN SMELTING AND REFINING COMPANY,
Respondent.

Findings From the Record, Opinion, Conclusions of Law, and Judgment.

This matter constitutes a proceeding for review of a final determination of the State Tax Appeal Board of the State of Montana pursuant to Section 84-709.1 R.C.M. 1947, and with respect to the Montana Corporation License Tax liability of respondent for the years 1967, 1968, 1969 and 1970.

On the 14th day of March, 1974, the State Tax Appeal Board of the State of Montana in those certain proceedings entitled "American Smelting and Refining Company, Appellant, vs. The Department of Revenue of the State of Montana, Respondent", being No. CT-1973-17 before the State Tax Appeal Board, made and entered its Findings of Fact, Conclusions of Law, and Order.

That thereafter, and pursuant to Section 84-709.1, R.C.M. 1947, the Department of Revenue of the State of Montana, filed its Petition for proceedings for review of said Findings of Fact, Conclusions of Law and Order (herein referred to as "final decision") of said State Tax Appeal Board of the State of Montana. That said Petition for Review was filed on the 9th day of April, 1974.

That on the 16th day of May, 1974, the Department of Revenue filed its motion to present additional evidence

and a request for oral hearings and written briefs, and on the 2nd day of December, 1974, filed an Amended Petition to Present Additional Evidence.

The Department of Revenue of the State of Montana was represented in this matter by Theodore W. deLooze, Special Assistant Attorney General, admitted for the purposes of this proceeding, and Terry B. Cosgrove, Special Assistant Attorney General. The respondent, The American Smelting and Refining Company, was represented by George T. Bennett of the firm of Hughes, Bennett & Cain. The matter having been fully briefed and twice orally argued to the court, and the court having taken the application of the Department of Revenue for leave to introduce evidence under advisement, and the matter having otherwise been submitted upon the record made before the State Tax Appeal Board of the State of Montana, the Court makes the following Findings From The Record, Opinion, Conclusions of Law, and Judgment:

Findings From the Record

1. That the appellant, American Smelting and Refining Company (ASARCO), is a corporation organized and existing under the laws of the State of New Jersey, and is qualified to do and doing business in the State of Montana, and maintains its commercial domicile at 120 Broadway, New York City, New York.

2. That the appellant is engaged in the business of mining, smelting, refining, manufacturing, buying and selling non-ferrous metals and other minerals, and, in addition, receives income in the form of dividends, interest, patents, royalties, mine royalties and gains from the sale of certain properties.

3. That the following active companies are wholly owned subsidiaries of the appellant:

(a) ASARCO Developments (NZ) Ltd., a New Zealand corporation, engaged in the examination of

mining properties, principally for others, in New Zealand;

(b) ASARCO Exploration Company of Canada, Ltd., a Canadian corporation, engaged in the examination of mining properties;

(c) ASARCO (Australia) Pty., Limited, an Australian corporation, engaged in the examination of mining properties principally for others, in Australia;

(d) ASARCO International Corporation, a Delaware corporation, engaged in the sale of asbestos fibre produced by Lake Asbestos of Quebec, Ltd.;

(e) ASARCO Mercantile Company, a Texas corporation, engaged in the purchase and sale of manufactured products, principally for ASARCO and certain subsidiaries;

(f) Bolivian Lead Corporation, a New York corporation, engaged in mining in Bolivia, South America;

(g) Compania American Smelting, S.A., a Chilean corporation, engaged in the leasing of mineral rights in Chile;

(h) Enthone, Incorporated, a Connecticut corporation, engaged in the manufacture and sale of metal and other surface finishing chemicals and supplies;

(i) Federated Metals Canada Limited, a Canadian corporation, engaged in producing chemicals in Canada;

(j) International Metal Company, a New York corporation, a dealer in concentrates and metals;

(k) Lake Asbestos of Quebec, Ltd., a Delaware corporation, engaged in mining of asbestos ore and the production of asbestos fibre in Canada;

(l) Lone Star Lead Construction Corp., a New York corporation, engaged as a contractor in construction of non-ferrous tank houses; and

(m) Northern Peru Mining Corporation, a Delaware corporation, engaged in mining non-ferrous metals in Peru.

4. That appellant owns and operates a smelter in East Helena, Montana, where it receives lead ores and concentrates from company mines as well as unrelated suppliers. The appellant's East Helena, Montana, lead smelter ships the refined lead product to other units of the appellant for further treatment and ultimate sale, and sells by-products of its smelting operation. The appellant also owns in Montana active and inactive mining properties.

5. That appellant is a unitary business and files its Montana tax returns using the apportionment method.

6. That an audit was conducted of the books and records of appellant for the years 1967, 1968, 1969, and 1970, by an auditor of the Multistate Tax Commission.

7. That due to the audit conducted on the books and records of appellant that a deficiency assessment was levied against appellant for the years 1967, 1968, 1969, and 1970, in the amount of $409,145.07, of which $71,845.69 was interest, none of which has been paid.

8. That appellant reported its income for Montana Corporation License Tax purposes for the taxable years 1967 through 1970 in the following manner:

(a) Income from mine royalties consisting of the Keystone Mine in the State of Colorado was allocated to the State of Colorado;

(b) Income from patents and copyrights were allocated to commercial domicile;

(c) Income from rental of housing units on mining properties was allocated to the state where such rental units are located;

(d) Interest income was allocated to the state of commercial domicile;

(e) Gains from sales of tangible properties were allocated to the state of sale;

(f) Dividends paid on stocks were allocated to state of commercial domicile; and

(g) All other income was apportioned by the formula prescribed by Section 84-1503, R.C.M. 1947.

9. That the Corporation License Tax Bureau of the Department of Revenue, in making the deficiency assessment as set forth in Exhibit "E", included all income of the appellant, and by Federated Metals of Canada, ASARCO Mercantile Company, Enthone, Inc., International Metal Company, Lone Star Lead Construction Corp., and Northern Peru Mining Corporation; and treated all of such income as apportionable by formulae whereby there was apportioned to the State of Montana an allocated part based on the relationship between the tangible property, sales, and payroll, with respect to the Montana operation in relation to the total operations.

10. That, with the exception of securities deposited with various state agencies and monies deposited locally in the State of Montana, the income from which have been allocated to the State of Montana, all of the appellant's stocks, bonds, commercial paper and other evidences of indebtedness are located outside of the State of Montana.

11. That all of the appellant's income from mine royalties, patents, copyrights, rental, interest, dividends and gains upon sales of tangible or intangible properties, can be properly segregated as to sources within and sources without the State of Montana.

12. That the business operations conducted by the appellant and the business operations conducted by its affiliated corporations are not interrelated or interdependent to the extent that the net income of the appellant and any one or more of its affiliated corporations cannot resonably be determined without reference to the operations conducted by the other companies and that the income of the affiliated corporations has been properly reported by separate accounting.

13. That the appellant for a number of years has owned common stock of General Cable Corporation. That, pursuant to a Consent Decree entered by the United States District Court on March 15, 1967, in a proceeding commenced by the Anti-Trust Division of the Justice Department, the appellant and General Cable Corporation were enjoined from having a director or officer who was at the same time a director, officer or employee of the other, and that the appellant give a proxy covering its stock holdings to the persons designated by General Cable's board of directors prior to any stockholders' meeting. On July 24, 1970, the Consent Decree was modified to require complete divestiture by appellant of all of its common stockholdings of General Cable Corporation. Pursuant thereto, appellant did sell such stock in the taxable year 1970.

14. That this is a proper proceeding for review of the final decision of the State Tax Appeal Board of the State of Montana instituted before this Court by the filing of a Petition within thirty (30) days after service of the final decision of the State Tax Appeal Board and pursuant to Section 84-709.1, R. C. M.

15. That the issues determined by the State Tax Appeal Board of the State of Montana by its final decision on the 14th day of March, 1974, were as follows:

(a) Whether American Smelting and Refining Company, for Montana Corporation License Tax purposes

and pursuant to Sections 84-1501, et seq., R. C. M. 1947, properly reported the following items of income as being from sources without the State of Montana, viz., (1) income from mine royalties consisting of the Keystone Mine in the State of Colorado; (2) income from patents and copyrights; (3) income from rental of housing units on mining properties located outside the State of Montana; (4) interest income earned on bonds, commercial paper and other evidence of indebtedness invested, maintained and located outside the State of Montana; (5) gains from sales of properties located outside the State of Montana; and (6) dividends paid on stocks located and maintained at commercial domicile; and

(b) Whether the respondent, American Smelting and Refining Company, could be required by the Department to combine the income of Federated Metals of Canada, Asarco Mercantile Company, Enthone, Inc., International Metal Company, Lone Star Lead Construction Corp., and Northern Peru Mining Corporation, with its income and allocate the same to the State of Montana.

16. The State Tax Appeal Board of the State of Montana determined as to the first issue that for the taxable years 1967, 1968, 1969 and 1970, the respondent American Smelting and Refining Company had properly separated its income from sources within the State of Montana from income from sources without the State of Montana.

17. That as to the second issue the State Tax Appeal Board of the State of Montana determined that the business operations conducted by the respondent American Smelting and Refining Company and the business operations conducted by its affiliated corporations were not interrelated or interdependent to the extent that the net income of the respondent American Smelting and Refining Company in any one or more of its affiliated corporations could not reasonably be determined without

reference to the operations conducted by the other companies, and that the income of the affiliated corporations was properly reported by separate accounting.

18. That the respondent, Montana Department of Revenue of the State of Montana, has by its amended petition to present additional evidence, asked that the respondent American Smelting and Refining Company be required to answer certain questions with respect to its dividend, rental, royalty, interest income, and gains on sale of capital assets, the questions all being generally, whether, with respect to such income received by the taxpayer for the years listed, such income was "used in the trade or business of the company" after it had been earned or derived.

19. The Department, appellant here, has offered no reason why such proposed additional evidence was not produced at the proceedings before the Department of Revenue or before the State Tax Appeal Board and is now the subject of an application before this Court.

From the foregoing Findings From the Record, the Court makes the following:

OPINION

The respondent filed its Montana Corporation License Tax returns for the taxable years in question and thereafter the Department of Revenue, acting in conjunction with the Multi-state Tax Commission, audited such returns and made adjustments with respect thereto. It is these adjustments that are the subject of this controversy.

First, in adjusting the corporation license tax liability of the respondent for the taxable years in question, the Department made the following described adjustment to dividend income, rental income, royalty income and gains on sales of capital assets, whereas the respondent had, as to such income, reported the same as follows according to the findings of the Montana State Tax Appeal Board:

(a) Income from mine royalties consisting of the Keystone Mine in the State of Colorado was allocated to the State of Colorado;

(b) Income from patents and copyrights were allocated to commercial domicile;

(c) Income from rental of housing units on mining properties was allocated to the state where such rental units are located;

(d) Interest income was allocated to the state of commercial domicile;

(e) Gains from sales of tangible properties were allocated to the state of sale;

(f) Dividends paid on stocks were allocated to state of commercial domicile; and

(g) All other income was apportioned by the formula prescribed by Section 84-1503, R.C.M. 1947.

As to its income from investments held and maintained in Montana, the respondent treated such income as entirely earned from sources within the State of Montana and reported the income accordingly.

The Department of Revenue, purporting to act under the "principles" of the Uniform Division of Income for Tax Purposes Act, treated all of the respondent's investment income, whether earned from sources within or sources without the State of Montana, as "business income" and required the same to be apportioned between Montana and other states according to a formula based upon the ratio of sales, property and payroll within and without the State of Montana. The State Board of Equalization of the State of Montana, and predecessor to the Department of Revenue, purported to adopt on December 30, 1966, and effective with respect to taxable years beginning on and after January 1, 1967, regulations

numbered 1001, et seq., for the "allocation and apportionment of income."

The Department of Revenue contends that its predecessor had a right to adopt such regulations and that it has a right to enforce such regulations under the provisions of Section 84-1503, R.C.M. 1947.

Under the Uniform Division of Income for Tax Purposes Act, and under the regulations adopted by the prior State Board of Equalization and attempted to be enforced by the Department of Revenue, there is a distinction drawn between "businss income" and non-business income." The term "business income" is defined as "income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." As to rents, capital gains, interest, dividends, royalties and other similar types of investment income, if it is found to constitute non-business income it is allocated pursuant to specific allocation rules therein incorporated. Thus, as to the passive or investment income of the respondent as described by the Montana State Tax Appeal Board, the Department of Revenue contended that respondent was a unitary business within the meaning of the definition contained in Regulations 1001, et seq; that all of the income of the respondent constituted "business income"; and that, therefore, all of the passive or investment income of the respondent, whether it was clearly earned from sources within the State of Montana or clearly earned from sources without the State of Montana, was to be allocated according to the formula the factors of which are payroll, property and sales.

In this Court's opinion, Section 84-1503, R.C.M. 1947, as effective for the taxable years 1967 through 1970, in-

clusive, is controlling. Pursuant to that section, the Department of Revenue and its predecessor, the State Board of Equalization, had the authority to adopt regulations as to the apportionment of income only where it finds that such income cannot be properly segregated as to sources within or without the State. The section provided, for the taxable years in question:

> "If the income of any corporation from sources within the state cannot be properly segregated from income without the state, then, in that event, the amount of the net income returned shall be that proportion of the taxpayer's total net income which the taxpayer's gross business done in the state of Montana bears to the total gross business of the taxpayer, and apportionment shall be made under the rules and regulations prescribed by the state board of equalization, giving consideration to sales, property and payroll and such other factors as may be deemed applicable; provided, however, that the state board of equalization shall, upon the presentation of satisfactory evidence, determine that the income from sources within the state of Montana may be properly segregated from income from sources without the state of Montana and shall allow separate accounting. The board shall publish not less than once a year, all rules and regulations pertaining to this section. All decisions by the board under this section shall be subject to judicial review in an action prosecuted by the corporation in the district court of Lewis and Clark county. The taxpayer cannot change from one method of accounting to another method of accounting without first obtaining permission from the board."

Under the clear and unambiguous language of this section, the taxing authorities of the State of Montana had the authority to adopt rules and regulations only as

to the apportionment of such income as could not be segregated as to source. If income could be segregated as to source, then it was allocable to that source in its entirety. Secondly, this section very clearly provides that the taxing authorities of the State of Montana must, upon the presentation of "satisfactory evidence", determine "that the income from sources within the State of Montana may be properly segregated from income from sources without the State of Montana and shall allow separate accounting". Here, the State Tax Appeal Board, by its Finding No. 10 determined:

> "That, with the exception of securities deposited with various state agencies and monies deposited locally in the State of Montana, the income from which have been allocated to the State of Montana, all of the Appellant's (Respondent's) stocks, bonds, commercial paper and other evidences of indebtedness are invested in intangibles outside of the State of Montana and all of such evidences of indebtedness are located outside of the State of Montana."

The Montana State Tax Appeal Board, by its Finding No. 11, found and determined:

> "That all of the Appellant's (Respondent's) income from mine royalties, patents, copyrights, rental, interest, dividends and gains upon sales of tangible or intangible properties, can be properly segregated as to sources within and sources without the State of Montana."

The Department of Revenue apparently does not quarrel with the Findings of the State Tax Appeal Board quoted hereinabove. To the contrary, the contention of the Department is that "source of income" is no longer the test, that the test is whether or not such income constitutes "business income" as defined in the Uniform

Division of Income for Tax Purposes Act. In this respect, this Court must point out that Section 84-1503, R. C. M. 1947, was in fact amended by Section 2, Chapter 5 of the Laws of 1974, effective as to all taxable years on and after December 31, 1973, to specifically make applicable to the Montana Corporation License Tax the provisions of the Uniform Division of Income for Tax Purposes Act, and, in addition, by Section 84-1503, R.C.M. 1947, Subsection (1)(a), a definition of unitary business. Prior to this amendment, the only definition of unitary business contained in the Montana Corporation License Tax Act was in Section 84-1509, R.C.M. 1947, with regard to affiliated corporations. The Montana Corporation License Tax Act, prior to this amendment, did not contain any definition of nor did it make any distinction between so-called "business" or "non-business" income. There is no issue before this Court as to whether or not the respondent is a unitary business under Section 84-1503, R.C.M. 1947, as amended by Section 2, Chapter 5, Laws of 1974, and effective for all taxable years on and after December 31, 1973. Very clearly the question here is the interpretation of Section 84-1503, R.C.M. 1947, prior to the 1974 amendments. Section 84-1503, R.C.M. 1947, prior to such amendments, is clear and unambiguous. It allows the taxpayer to segregate income which can be clearly identified as to source. There appears to be no question here that if this is the test that the income of the respondent which is in question here can be identified as to source. This being determinative, the decision of the Montana State Tax Appeal Board with respect thereto is correct.

In interpreting Section 84-1503, R. C. M., prior to its amendment in 1974, this Court is to ascertain and give effect to the intention of the Legislature as expressed in the statute; Section 93-401-16, R. C. M. Where the plain meaning of words used indicate the legislative in-

tent, courts may not go further and apply any other means of interpretation. State ex rel. Huffman v. District Court, 154 Mont. 201, 461 P.2d 847.

Here, the key language of Section 84-1503, as then effective, is:

> "If the income of any corporation from sources within the state cannot be properly segregated from income without the state, *then, in that event, . . .*" (Emphasis supplied.)

The "event" which triggers Section 84-1503 is where income cannot be properly segregated and this is the express holding of the Supreme Court in Montana Life Insurance Company v. Shannon, 106 Mont. 500, 78 P.2d 946, where it is said (P.504):

> "Furthermore, when the amount of gross income within the state was known and determined properly, then the principal question involved in this litigation was thereby settled. In the circumstances of this case, the Board could not properly invoke the rule of Section 2297.1 (now Section 84-1503, R. C. M. 1947) as the statute has no application here."

Additionally, the Department was required under Section 84-1503, R. C. M., as effective, to allow the taxpayer to segregate income intermingled as to source by separate accounting and upon "satisfactory" evidence that this could be done.

In contrast, the Legislature has changed this rule by its 1974 amendments to Section 84-1503, R. C. M. Under this section as amended, separate accounting is not allowed to a "unitary" business and the term "unitary" is defined in different terms from those contained in Section 84-1509, R. C. M.

In short, it would appea. that the Legislature by this amendment in 1974, has changed the rule from "source of income" to nature of income (business or non-business) and changed the rule of accounting as to unitary and non-unitary businesses.

There is a presumption that in amending an existing statute (Section 84-1503), that the legislature intended to make a change therein; State ex rel Dick Irvin, Inc., v. Anderson, (1974) —— Mont. ——, 525 P.2d 564; Montana Milk Control Brd. v. Community Creamery Company, 139 Mont. 523, 366 P.2d 151; Van Tigham v. Lennane, 136 Mont. 547, 349 P.2d 569.

Here there is more than just a presumption of change as to such statute. Here, clearly, the Legislature has shifted from the "source" rule to the "unitary" or "non-unitary" "business", "non-business" income approach. In light of this the attempt by the taxing authorities to make such a change by Regulations 1001, et seq., prior to such 1974 legislative change, was ineffective.

Turning to the second issue, the respondent, in reporting its taxable income to the State of Montana for the taxable years 1967 through and including 1970, did not include the income of any of its affiliated corporations which are not doing business within the State of Montana. The Department of Revenue in making its deficiency assessments for these years included with the income of respondent the income of Federated Metals of Canada, Asarco Mercantile Company, Enthone, Inc., International Metal Company, Lone Star Lead Construction Corp., and Northern Peru Mining Corporation, on the theory that all of these corporations were "unitary" under Regulations 1001, et seq. This income then having been deemed to be the income of the respondent was apportioned according to the formula based upon sales, property and payroll.

The Montana State Tax Appeal Board, by its Finding of Fact No. 12, found and determined:

> "That the business operations conducted by the Appellant (Respondent) and the business operations conducted by its affiliated corporations are not interrelated or interdependent to the extent that the net income of the Appellant (Respondent) and any one or more of its affiliated corporations cannot reasonably be determined without reference to the operations conducted by the other companies and that the income of the affiliated corporations has been properly reported by separate accounting."

In light of this Finding of Fact, the State Tax Appeal Board correctly determined that under Section 84-1509, R. C. M. 1947, the Department could not require the income of these affiliated corporations to be combined or consolidated with the income of the respondent.

The Department of Revenue, on the other hand, argues that Section 84-1509, R. C. M. 1947, is not the controlling statute. At page 17 of the Department's final brief in this matter, it states, commencing at Line 26:

> "In no way can Section 84-1509 be read as a statute providing for combination. The authority for combining the company and its subsidiaries is found in the case law and the Department's Regulations 1001."

The Court has examined the Department's Regulation "1001". Section 1001 of the Department's regulations speaks in all three paragraphs of "a corporation subject to this tax", or "a corporation engaged in a 'unitary' business operation within and without Montana", and "a corporation not engaged in a unitary business. . . ." In all instances, this regulation deals with a single corporation. If it was the intent of this regulations to apply to affiliated corporations, then it should have so stated. In any event,

it is the opinion of this Court that the Department of Revenue and its predecessor, the State Board of Equalization, had no authority to go beyond the clear provisions of Section 84-1509, R. C. M. 1947. The Legislature of the State of Montana having, by Section 84-1509, R. C. M. 1947, addressed itself to the problem of the combining or consolidating of income of affiliated corporations, and this section being the only section in the Montana Corporation License Tax Act which deals with affiliated corporations, it is controlling.

The express mention of one subject or authority in an act (affiliated corporations under Section 84-1509) excludes other similar matters not mentioned; Helena Valley Irrigation District v. State Highway Commission, 150 Mont. 192, 433 P. 2d 791; Reed v. Reed, 130 Mont. 409, 304 P.2d 590; Stephens v. City of Great Falls, 119 Mont. 368, 175 P.2d 408. The Court must reject the Department's contention that it can rely upon its own regulations or "case law" to come to a different requirement than that expressed in the act.

The Court has examined the "case law" as cited by the Department and such "case law" consists of cases from the State of California and the State of Oregon construing statutes of those states which are different from those contained in the Montana Corporation License Tax Act. It is the opinion of this Court that the Department of Revenue must, for the taxable years here in question, find its authority to combine or consolidate the income of affiliated corporations under the provisions of Section 84-1509, R. C. M. 1947, and the State Tax Appeal Board, having determined that this section does not require the combination or consolidation of the respondent with its affiliated corporations, its decision must be affirmed.

Lastly, the Department of Revenue has filed herein an Amended Petition to Present Additional Evidence. There has been no satisfactory reason advanced by the Depart-

ment for failure to present the evidence before the State Tax Appeal Board. (See Section 82-4216 as amended.) Additionally such evidence is irrelevant in view of this Court's opinion as to the law under which the American Smelting and Refining Company is to be taxed for the years in question.

CONCLUSIONS OF LAW

I.

That the Findings of Fact, Conclusions of Law and Order of the State Tax Appeal Board of the State of Montana so made on the 14th day of March, 1974, constituting its final decision, should be by this Court affirmed in all respects.

II.

That the application of the appellant, Department of Revenue, for leave to introduce additional evidence should be denied.

III.

That pursuant to Section 84-1503, R.C.M. as effective for the taxable years 1967, 1968, 1969 and 1970, the Department of Revenue had the authority to adopt rules and regulations only with respect to the "apportionment" of income which could not be properly segregated as to source. The Department of Revenue of the State of Montana had no authority under this section to adopt regulations which attempted to define source of income or to define unitary business or unitary operation.

IV.

That Section 84-1503, R.C.M. 1947, for the taxable years in question, required that the Department of Revenue allow a taxpayer upon satisfactory evidence to separately account for income from sources within the State of Montana and income from sources without the State of Montana.

V.

That Section 84-1509, R.C.M. 1947, is the only provision of the Corporation License Tax Act applicable for the taxable years 1967, 1968, 1969 and 1970 which contains a definition of unitary business operation or deals with the requirement of consolidated or combined returns of income between related corporations. That the definition of unitary business operation therein contained requires that one business operation be so conducted by the corporation and the affiliated group that they are interrelated or interdependent to the extent that the net income of one corporation cannot be reasonably determined without reference to the operations conducted by the other corporations.

VI.

That the State Tax Appeal Board correctly found and determined that the respondent's dividend income, rental income, royalty income and income from gains on sale of assets had been properly segregated and identified as to its source within or without Montana under Section 84-1503, R.C.M. 1947.

VII.

That the State Tax Appeal Board correctly found and determined that all of the respondent's stocks, bonds, commercial paper and other evidences of indebtedness are invested in intangibles outside of the State of Montana except as to those investments held in Montana and totally allocated to Montana, and that all of such evidences of indebtedness are located outside of the State of Montana and therefore such income having been identified as to source was properly reported by respondent.

VIII.

That the State Tax Appeal Board correctly found and determined that the business operations conducted by the respondent, American Smelting and Refining Company, and the business operations conducted by its affiliated corporations are not interrelated or interdependent to the extent that the net income of the respondent and any one or more of its affiliated corporations cannot reasonably be determined without reference to the operations conducted by the other companies and that the income of the affiliated corporations had been properly reported by separate accounting.

IX.

That the respondent, American Smelting and Refining Company, properly reported its income for the taxable years 1967, 1968, 1969 and 1970 pursuant to the appropriate provisions of the Montana Corporation License Tax Act as contained in Sections 84-1501, et seq., R.C.M. 1947.

JUDGMENT

Upon the foregoing Findings From The Record and Conclusions of Law, the Court makes the following Judgment:

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the final decision of the State Tax Appeal Board of the State of Montana as contained in its "Findings of Fact, Conclusions of Law and Order", is in all respects by this Court affirmed.

Dated this 17 day of December, 1975.

/s/ PETER G. MELOY
District Judge

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

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(Caption Omitted in Printing)

Findings of Fact, Conclusions of Law, and Order

• • • • • •

Hearing on the appeal of AMERICAN SMELTING AND REFINING COMPANY, pursuant to Section 84-708, R.C.M. 1947, came on regularly for hearing before the Board on January 7, 1974, at 10:00 a.m., in the City of Helena, Montana, from a decision of the Department of Revenue denying Appellant's requested relief with respect to the combining or consolidating of affiliated corporations with Appellant for tax purposes and refusing to set aside the deficiency assessments levied against said Appellant based thereon and the decision of the Department of Revenue in treating all of Appellant's income, regardless of source or nature, as allocatable by formula, contrary to the Corporation License Tax Act of the State of Montana, and refusing to set aside the deficiency assessments based thereon for the taxable years 1967, 1968, 1969, and 1970; the Appellant, American Smelting and Refining Company, appearing through its attorney, George T. Bennett, Esq., of the firm of Hughes, Bennett and Cain, Helena, Montana; and the Department of Revenue being represented by Terry B. Cosgrove, Esq., Assistant Tax Counsel; and the Board having heard the testimony and having examined all of the evidence and briefs offered by all parties, and the Board being fully advised in the premises, does hereby make its Findings of Fact, Conclusions of Law and Order as follows:

FINDINGS OF FACT

1. That the Appellant, American Smelting and Refining Company (ASARCO), is a corporation organized and existing under the laws of the State of New Jersey, and is qualified to do and doing business in the State of Montana,

and maintains its commercial domicile at 120 Broadway, New York City, New York.

2. That the Appellant is engaged in the business of mining, smelting, refining, manufacturing, buying and selling non-ferrous metals and other minerals, and, in addition, receives income in the form of dividends, interest, patents, royalties, mine royalties and gains from the sale of certain properties.

3. That the following active companies are wholly owned subsidiaries of the Appellant:

(a) ASARCO Developments (NZ) Ltd., a New Zealand corporation, engaged in the examination of mining properties, principally for others, in New Zealand;

(b) ASARCO Exploration Company of Canada, Ltd., a Canadian corporation, engaged in the examination of mining properties;

(c) ASARCO (Australia) Pty., Limited, an Australian corporation, engaged in the examination of mining properties, principally for others, in Australia;

(d) ASARCO International Corporation, a Delaware corporation, engaged in the sale of asbestos fibre produced by Lake Asbestos of Quebec, Ltd.;

(e) ASARCO Mercantile Company, a Texas corporation, engaged in the purchase and sale of manufactured products, principally for ASARCO and certain subsidiaries;

(f) Bolivian Lead Corporation, a New York corporation, engaged in mining in Bolivia, South America;

(g) Compania American Smelting, S.A., a Chilean corporation, engaged in the leasing of mineral rights in Chile;

(h) Enthone, Incorporated, a Connecticut corporation, engaged in the manufacture and sale of metal and other surface finishing chemicals and supplies;

(i) Federated Metals Canada Limited, a Canadian corporation, engaged in producing chemicals in Canada;

(j) International Metal Company, a New York corporation, a dealer in concentrates and metals;

(k) Lake Asbestos of Quebec, Ltd., a Delaware corporation, engaged in mining of asbestos ore and the production of asbestos fibre in Canada;

(l) Lone Star Lead Construction Corp., a New York corporation, engaged as a contractor in construction of non-ferrous tank houses; and

(m) Northern Peru Mining Corporation, a Delaware corporation, engaged in mining non-ferrous metals in Peru.

4. That Appellant owns and operates a smelter in East Helena, Montana, where it receives lead ores and concentrates from company mines as well as unrelated suppliers. The Appellant's East Helena, Montana, lead smelter ships the refined lead product to other units of the Appellant for further treatment and ultimate sale, and sells by-products of its smelting operation. The Appellant also owns in Montana active and inactive mining properties.

5. That Appellant is a unitary business and files its Montana tax returns using the apportionment method.

6. That an audit was conducted of the books and records of Appellant for the years 1967, 1968, 1969, and 1970, by an auditor of the Multistate Tax Commission.

7. That due to the audit conducted on the books and records of Appellant that a deficiency assessment was levied against Appellant for the years 1967, 1968, 1969,

and 1970, in the amount of $409,145.07, of which $71,845.69 was interest, none of which has been paid.

8. That Appellant reported its income for Montana Corporation License Tax purposes for the taxable years 1967 through 1970 in the following manner:

(a) Income from mine royalties consisting of the Keystone Mine in the State of Colorado was allocated to the State of Colorado;

(b) Income from patents and copyrights were allocated to commercial domicile;

(c) Income from rental of housing units on mining properties was allocated to the state where such rental units are located;

(d) Interest income was allocated to the state of commercial domicile;

(e) Gains from sales of tangible properties were allocated to the state of sale;

(f) Dividends paid on stocks were allocated to state of commercial domicile; and

(g) All other income was apportioned by the formula prescribed by Section 84-1503. R.C.M. 1947.

9. That the Corporation License Tax Bureau of the Department of Revenue, in making the deficiency assessment as set forth in Exhibit "E", included all income of the Appellant, and by Federated Metals of Canada, ASARCO Mercantile Company, Enthone, Inc., International Metal Company, Lone Star Lead Construction Corp., and Northern Peru Mining Corporation; and treated all of such income as apportionable by formulae whereby there was apportioned to the State of Montana an allocated part based on the relationship between the tangible property, sales, and payroll, with respect to the Montana operation, in relation to the total operations.

10. That, with the exception of securities deposited with various state agencies and monies deposited locally in the State of Montana, the income from which have been allocated to the State of Montana, all of the Appellant's stocks, bonds, commercial paper and other evidences of indebtedness are invested in intangibles outside of the State of Montana and all of such evidences of indebtedness are located outside of the State of Montana.

11. That all of the Appellant's income from mine royalties, patents, copyrights, rental, interest, dividends and gains upon sales of tangible or intangible properties, can be properly segregated as to sources within and sources without the State of Montana.

12. That the business operations conducted by the Appellant and the business operations conducted by its affiliated corporations are not interrelated or interdependent to the extent that the net income of the Appellant and any one or more of its affiliated corporations cannot reasonably be determined without reference to the operations conducted by the other companies and that the income of the affiliated corporations has been properly reported by separate accounting.

13. That the Appellant for a number of years has owned common stock of General Cable Corporation. That, pursuant to a Consent Decree entered by the United States District Court on March 15, 1967, in a proceeding commenced by the Anti-Trust Division of the Justice Department, the Appellant and General Cable Corporation were enjoined from having a director or officer who was at the same time a director, officer or employee of the other, and that the Appellant give a proxy covering its stock holdings to the persons designated by General Cable's board of directors prior to any stockholders' meeting. On July 24, 1970, the Consent Decree was modified to require complete divestiture by Appellant of all of its common stockholdings of General Cable Corporation. Pursuant thereto, Appellant did sell such stock in the taxable year 1970.

Conclusions of Law

1. That the gain upon the sale by Appellant of its shares of common stock of General Cable Corporation was income derived from a forced sale and was not income from a sale in the regular course of Appellant's trade or business.

2. That as to those matters on appeal to this Board, the Appellant properly reported all of its income from mine royalties, patents, copyrights, rental, interest, dividends and gains upon sale of tangible or intangible properties and properly allocated such income to sources within and without the State of Montana.

3. That Appellant properly reported all of its income from its integrated mining, smelting and refining business, and properly apportioned to the State of Montana the proper portion thereof under appropriate formulae as to those matters on appeal to this Board.

4. That all Appellant's income as to those matters on appeal to this Board was properly reported, allocated and apportioned in accordance with the Montana Corporation License Tax Act effective for the taxable years in question.

5. That the Appellant cannot be required to file combined or consolidated reports with any affiliated corporation.

Order

Based on the above Findings of Fact and Conclusions of Law, It Is Hereby Ordered:

1. That the Taxpayer's appeal from the decision of the Department of Revenue is granted.

2. That the Corporation License Tax Bureau of the Department of Revenue recompute the deficiency assessment for the taxable years 1967, 1968, 1969, and 1970, in accordance with the Corporation License Tax Returns filed by

Appellant (Exhibits "A" to "D") and render a statement to the Appellant for such taxes and interest thereon to date as and for the Appellant's liability, subject, however, to the adjustments hereafter mentioned, which were ordered by the Department of Revenue following its hearing in this matter and which were not a part of this appeal:

(a) Adjustment for the value of the Block P Mine in the property factor;

(b) Adjustment for property in bonded warehouses;

(c) Adjustment for inventory in transit;

(d) Adjustment for payments of tax made by Taxpayer as a result of Federal audit; and

(e) Adjustments necessary by reason of the Federal audit for taxable year 1969.

3. Subject to the above, and subject to the 1970 Federal audit, the deficiencies for all taxable years in question are hereby set aside and vacated.

Dated this 14th day of March, 1974.

By Order of the
State Tax Appeal Board

/s/ Ray J. Wayrynen
Ray J. Wayrynen, Chairman

/s/ Helen M. Peterson
Helen M. Peterson, Member

Member J. Morley Cooper dissenting:
I dissent.

/s/ J. Morley Cooper
J. Morley Cooper, Member

Attest:

/s/ Vernon B. Miller
Vernon B. Miller, Secretary

APPENDIX B

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

MONTANA DEPARTMENT OF REVENUE, of the State of Montana, *Petitioner,*

-VS-

AMERICAN SMELTING AND REFINING COMPANY, *Respondent.*

No. 37750

Judgment on Remittitur

(Filed August 18, 1977)

THIS ACTION came on regularly for hearing before this Court, the Petitioner, Montana Department of Revenue, appeared in this matter by Theodore W. deLooze, Special Assistant Attorney General, and Terry B. Cosgrove, Special Assistant Attorney General, the Respondent, American Smelting and Refining Company appeared by its attorney, George T. Bennett of the firm of Hughes, Bennett & Cain. The matter having been fully briefed and twice orally argued to the Court, the Court entered Findings From the Record, Opinion, Conclusions of Law and Judgment, on the 17th day of December, 1975, in favor of the Respondent.

That Order was appealed to the Montana Supreme Court, after the filing of briefs and oral argument, the said Montana Supreme Court reversed the Judgment and

a Remittitur was issued by the Clerk of the Montana Supreme Court on the 11th day of August, 1977, and this Court was directed to enter Judgment in favor of the Petitioner.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, IT IS ORDERED, AJUDGED AND DECREED AND THIS DOES ORDER, AJUDGE AND DECREE that the Respondent, American Smelting and Refining Company, is ordered to pay to the Petitioner, Montana Department of Revenue, $497,776.47, plus interest, as provided by law, and that Petitioner have execution therefore.

DONE AND DATED THIS 18 OF AUGUST, 1977.

/s/ JIM C. MELOY
District Judge

APPENDIX C

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

• • • • • •

Civil No. 37750

MONTANA DEPARTMENT OF REVENUE, STATE OF MONTANA,
Petitioner,

-VS-

ASARCO INCORPORATED (formerly THE AMERICAN SMELTING AND REFINING COMPANY), *Respondent.*

• • • • • •

Notice of Appeal to the Supreme Court of the United States

• • • • • •

Notice is hereby given that the Respondent above-named, ASARCO Incorporated (formerly The American Smeltin and Refining Company), hereby appeals to the Supreme Court of the United States from the final judgment, opinion and order of the Supreme Court of the State of Montana, reversing the judgment of the District Court of the First Judicial District, and from the order denying petition for rehearing, entered in this action on August 11, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ GEORGE T. BENNETT
George T. Bennett
Counsel for Respondent

(Affidavit Of Service Omitted In Printing)

IN THE SUPREME COURT
OF THE
STATE OF MONTANA

• • • • • •

CAUSE NO. 13249

• • • • • •

MONTANA DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA,
Petitioner and Appellant,

-VS-

ASARCO INCORPORATED (formerly THE AMERICAN SMELTING AND REFINING COMPANY),
Defendant and Respondent.

• • • • • •

Notice of Appeal to the Supreme Court of the United States

(Filed October 6, 1977)

• • • • • •

/s/ RICHARD T. CONBOY
Richard T. Conboy
Deputy Clerk of Supreme Court
Helena, Montana

Notice is hereby given that the Defendant and Respondent above-named, ASARCO Incorporated (formerly The American Smelting and Refining Company), hereby appeals to the Supreme Court of the United States from the final judgment, opinion and order of the Supreme Court of the State of Montana, reversing the judgment of the District Court of the First Judicial District, and from the order denying petition for rehearing, entered in this action on August 11, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ GEORGE T. BENNETT
George T. Bennett
Counsel for Defendant and Respondent

(Affidavit Of Service Omitted In Printing)

APPENDIX D

Section 84-1503, Revised Code of Montana 1947:

"If the income of any corporation from sources within the state cannot be properly segregated from income without the state, then, in that event, the amount of the net income returned shall be that proportion of the taxpayer's total net income which the taxpayer's gross business done in the state of Montana bears to the total gross business of the taxpayer, and apportionment shall be made under the rules and regulations prescribed by the state board of equalization, giving consideration to sales, property and payroll and such other factors as may be deemed applicable; provided, however, that the state board of equalization shall, upon the presentation of satisfactory evidence, determine that the income from sources within the state of Montana may be properly segregated from income from sources without the state of Montana and shall allow separate accounting. The board shall publish not less than once a year, all rules and regulations pertaining to this section. All decisions by the board under this section shall be subject to judicial review in an action prosecuted by the corporation in the district court of Lewis and Clark county. The taxpayer cannot change from one method of accounting to another method of accounting without first obtaining permission from the board."

Amended Regulation (Chapter 10) Adopted December 30, 1966. Effective With Respect to Taxable Years Beginning on or After January 1, 1967.

1001. General. When the income of a corporation subject to this tax is derived from or attributable to sources both within and without Montana, the tax is measured by the total net income derived from or attributable to

sources within Montana, and the corporation shall allocate and apportion its income as provided in this chapter of these regulations. It is the intent of regulations 1002 through 1019 to adopt the principles embodied in the "Uniform Division of Income for Tax Purposes Act", and they shall be so construed.

A corporation engaged in a "unitary" business operation within and without Montana must apportion its business income as provided for under section 1010. A business is unitary when the operation of the business within the state is dependent upon or contributory to the operation of the business outside the state or if the units of the business within and without the state are closely allied and not capable of separate maintenance as independent businesses.

A corporation not engaged in a unitary business operation must allocate its business income by means of separate accounting methods as provided for under section 1020; provided, its books and records are so kept that the income and expense attributable to business operations within the state can be properly segregated from total income and expense. If the corporation's books and records do not permit such proper segregation, its business income must be apportioned according to the provisions of section 1010.

1002. Definitions. As used in this chapter of these regulations, unless the context otherwise requires:

(a) "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

(b) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(c) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(d) "Non-business income" means all income other than business income.

(e) "Sales" means all gross receipts of the taxpayer not allocated under sections 1005 through 1009 of these regulations.

(f) "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

1003. Any corporation having income from business activity which is taxable both within and without this state shall allocate and apportion its net income as provided in this chapter of these regulations.

1004. For purposes of allocation and apportionment of income under this chapter of these regulations, a corporation is taxable in another state if (1) in that state it is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that state has jurisdiction to subject the corporation to a net income tax regardless of whether, in fact, the state does or does not.

1005. Rents and royalties from real or tangible personal property, capital gains, interest, dividends, or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in section 1006 through 1009 of this chapter of these regulations.

1006. (a) Net rents and royalties from real property located in this state are allocable to this state.

(b) Net rents and royalties from tangible personal property are allocable to this state:

(1) if and to the extent that the property is utilized in this state, or

(2) in their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.

(c) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.

1007.

(a) Capital gains and losses from sales or other dispositions of real property located in this state are allocable to this state.

(b) Capital gains and losses from sales or other dispositions of tangible personal property are allocable to this state if:

(1) the property had a situs in this state at the time of the sale or other disposition, or

(2) the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.

(c) Capital gains and losses from sales or other dispositions of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.

1008. Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state.

1009.

(a) Patent and copyright royalties are allocable to this state:

(1) if and to the extent that the patent or copyright is utilized by the payer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.

(b) A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patented product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

(c) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

1010. All business income shall be apportioned to this state by multiplying the income by a fraction, the numer-

ator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three.

1011. The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state in the production of business income during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used in the production of business income during the tax period.

1012. Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from sub-rentals.

1013. The average value of property shall be determined by averaging the values at the beginning and ending of the tax period but the State Board of Equalization may require to reflect properly the average value of the taxpayer's property.

1014. The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation related to business income, and the denominator of which is the total compensation related to business income paid everywhere during the tax period.

1015. Compensation is paid in this state if;

(a) the individual's service is performed entirely within the state; or

(b) the individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or

(c) some of the service is performed in the state and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the state or (2) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

1016. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

1017. Sales of tangible personal property are in this state if:

(a) the property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale; or

(b) the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and (1) the purchaser is the United States government, or (2) the taxpayer is not taxable in the state of the purchaser.

1018. Sales, other than sales of tangible personal property, are in this state if:

(a) the income-producing activity is performed in this state; or

(b) the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

1019. If the allocation and apportionment provisions of sections 1002 through 1018 of this chapter of these regulations do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the State Board of Equalization may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) separate accounting, if permitted within the scope of section 1001 of this chapter of these regulations;

(b) the exclusion of any one or more of the factors;

(c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

1020. Use of Separate Accounting Method. In applying the separate accounting method, each item of income is segregated and directly allocated according to its source. Any expense or other deductible items, including a reasonable allowance for general overhead expenses, attributable to the earning of such income are likewise segregated and deducted from such income. Items of nonbusiness income are to be allocated as provided for under sections 1005 through 1009 of this chapter of these regulations.

APPENDIX E

13249
No. 37750

IN THE
SUPREME COURT
OF THE
STATE OF MONTANA

MONTANA DEPARTMENT OF REVENUE, STATE OF MONTANA,
Petitioner-Appellant,

v.

THE AMERICAN SMELTING AND REFINING COMPANY,
Defendant-Respondent

Appellant's Brief

Appellant's Brief on Appeal from the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark.

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Attorneys for Defendant-Respondent

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4. *Tax consequences of Department's action.*

Each action of the Department: (1) Adding back into apportionable income, dividends, interest, royalties, rents and gains from the sale of properties: and (2) Combining the net income of ASARCO and its six unitary subsidiaries without regard to such add backs may be considered separately. The following figures show:

1. Income from Montana sources as reported by ASARCO.

2. Income from Montana sources arrived at by adding back business income into apportionable income.

3. Income from Montana sources apportioning the combined net income of ASARCO and its six unitary subsidiaries.

4. Income from Montana sources by apportioning the total combined net income of the unitary corporations, including the added back business income. As to the following figures demonstrate, for two of the four years combination by itself is a tax gain to the taxpayer and tax loss to Montana. The bulk of the tax effect of the Department's [12] action is in adding back into apportionable income that income determined by the Department to be business income and apportionable under its 1967 regulations. Figures for each of the years are as follows:

1967

1. Reported income.	$ 277,832
2. Adding back business income.	1,029,035
3. Combined reporting only.	265,563
4. Adding back business income and combining.	972,092

1968

1. Reported income.	6,981
2. Adding back business income.	1,176,823
3. Combined reporting only.	120,093
4. Adding back business income and combining.	1,125,987

1969

1. Reported income.	306,064
2. Adding back business income.	1,885,233
3. Combined reporting only.	346,702
4. Adding back business income and combining.	1,827,489

1970

1. Reported income.	(2,421)
2. Adding back business income.	2,381,685
3. Combined reporting only.	(125,322)
4. Adding back business income and combining.	2,280,491

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[48]

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Section 84-1509 R.C.M., 1947 provides for consolidation of corporations and not the combined method of reporting.

The lower court's rejection of combination is in part on the grounds that Section 84-1509 is the controlling statute. The court stated that the legislature had addressed itself to the problem "of the combining or consolidating of income of affiliated corporations, and this section being the only section in the Montana corporation license tax which

deals with affiliated corporations, it is controlling." (Opinion, p. 15). Section 84-1509 R.C.M., 1947 deals solely with the determination of the tax liability of the number of corporations which are affiliated, *where all of the corporations have a tax liability to the State of Montana.* Otherwise, there could be no statutory authority for the provision in that statute to apportion the liability to the respective affiliated corporations. If Montana had no jurisdiction, how could the liability be enforced? In the instant case what is being used is an *accounting method* to determine the tax liability of the single corporation, ASARCO. Since the six corporations being combined with ASARCO are not subject to the jurisdiction of Montana, in no way could Montana constitutionally *consolidate* [49] ASARCO with its wholly-owned subsidiaries under Section 84-1509 R.C.M., 1947. This, the district court did not understand. In a consolidation, a portion of the income of each corporation in the group of corporations is being taxed. In the combination, only that part of the entire net income of the group which is attributable to the ONE corporation over which the state has jurisdiction, is taxed. In a consolidation, the property, payroll and sales located in Montana of each member of the group are in the numerators of the apportionment factors. In combination, the numerators are from only one corporation. The apportionment factors in each case include in the denominators the entire property, the entire payroll, and the entire sales of the combined group.

Suppose that Montana wished to consolidate the net income of Union Pacific Railroad Company, a holding company, and its three subsidiaries, one a railroad operation, one an oil exploration, and one a real estate operation. If Montana had jurisdiction to tax all three corporations, it could consolidate the net income of all four corporations. It would then be determining the *combined* income of the *consolidated* group.

In the instant case we are determining the income of ASARCO, a single corporation, by apportioning the combined income of it and related corporations. There is no tax jurisdiction over the affiliates.

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APPENDIX F

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE PROTEST OF AMERICAN SMELTING & REFINING COMPANY, a New Jersey corporation.

Protest of Proposed Deficiency Assessments—Montana Corporation License Tax—Taxable Years 1967, 1968, 1969 and 1970

Comes now AMERICAN SMELTING & REFINING COMPANY, a New Jersey corporation, and for its protest of proposed deficiency assessments of Montana Corporation License Tax for the taxable years 1967, 1968, 1969, and 1970, states as follows:

1. That your Protestant, American Smelting & Refining Company, hereinafter referred to as "Taxpayer", is a corporation organized under the laws of the State of New Jersey with its principal place of business located at 120 Broadway, New York, New York, and that it is engaged in the business of mining, smelting, refining, manufacturing, buying and selling non-ferrous metals, metaliferous and other mineral products. That Taxpayer is engaged in the business in the State of Montana of operating a lead smelter in East Helena, Lewis and Clark County, and holding currently idle minerals lands.

2. That as a corporation organized and existing under the laws of another state and having its principal place of business and corporate domicile outside of the State of Montana, Taxpayer has, for many years last past, including the taxable years 1967, 1968, 1969, and 1970, reported its total net income from all sources within the State of Montana and paid a percentage license fee thereon, all as required by law.

3. That Taxpayer has, as aforesaid, filed the necessary returns for corporation license tax purposes showing its total net income received from sources within the State of Montana and has fully paid the tax thereon including all tax due with respect to the years 1967, 1968, 1969, and 1970. That, notwithstanding the foregoing, the Corporation Tax Bureau of the Department of Revenue of the State of Montana has proposed deficiency assessments for the years 1967, 1968, 1969 and 1970 as more particularly set forth in the letter (with attached schedules) of R. L. Kerns, Auditor, Corporation Tax Bureau, dated March 5, 1973, the same being hereunto attached as Exhibit "A" and by this reference made a part of this Protest.

4. That as to Taxpayer, pursuant to Section 84-1503, RCM, the Department of Revenue (and previously the State Board of Equalization) has determined the income accruing from sources within the State of Montana pursuant to a formula and factors adopted by rules and regulations prescribed by said state agency, and this Taxpayer has properly reported all such income and paid the corporation license tax thereon in accordance with such rules and regulations, formulae and factors for all years through and including 1967, 1968, 1969 and 1970. That the proposed deficiency assessments as contained in Exhibit "A" hereto constitutes an illegal and unlawful departure from the rules and regulations prescribed by the State Board of Equalization (now the Department of Revenue) pursuant to said Section 84-1503, RCM, and constitutes an illegal and unlawful attempt to impose corporation license tax upon income having no relationship to the Montana activities or the value of the privilege of doing business in Montana of and by this Taxpayer and has no reasonable relationship to corporate activities within the State of Montana conducted by Taxpayer; and constitutes an illegal and unlawful attempt to impose a corporation license tax upon income from interest, dividends, royalties, rentals and the sale of capital assets not arising from transactions or ac-

tivities in the regular course of Taxpayer's trade or business or the corporate activities of Taxpayer within the State of Montana.

5. That Taxpayer is informed and on such information states that the proposed deficiency assessments as contained in Exhibit "A" hereto are based upon audits, studies, formulae and factors adopted by the Multistate Tax Commission, which said Multistate Tax Compact is void and illegal by reason of conflict with Article I, Section 10, Clause 3 of the Constitution of the United States, which provides in pertinent part that "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power . . ."; and the Congress of the United States has never consented to a Multistate Tax Compact. In addition, said attempted and purported assessments of deficiency (Exhibit "A" hereto) are illegal, as attempted to be applied to this Tapayer, for the reason that pursuant to Article III of the Multistate Tax Compact, as adopted in the State of Montana by Section 84-6701, by Paragraph 1 of said Article III, it is provided that the taxpayer may elect to apportion and allocate income in the manner provided by the laws of the State of Montana or may elect to apportion and allocate in accordance with Article IV of said Multistate Tax Compact. That your Taxpayer has never elected to apportion and allocate income in accordance with Article IV of said Multistate Tax Compact but, to the contrary, has elected to apportion and allocate income in the manner provided by the Corporation License Tax Act of the State of Montana, being Sections 84-1501, et seq, RCM.

6. That after receipt of the deficiency assesments as contained in Exhibit "A" hereto, the Taxpayer, acting by and through its duly authorized attorneys, requested a copy of the audits conducted by the Multistate Tax Commission upon which said deficiency assessments were based, and

said attorneys were informed of the existence of said audits by Mr. R. L. Kerns, Auditor, Corporation Tax Bureau, and Mr. Gerald L. Foster, Chief Auditor, Corporation Tax Bureau, and further informed that copies of said audits would not be furnished to Taxpayer's said attorneys. That by reason of the refusal of the Corporation Tax Bureau of the Department of Revenue to furnish said audits so made by the Multistate Tax Commission, this Taxpayer cannot fully ascertain the manner in which said deficiency assessments (Exhibit "A" hereto) were prepared and cannot fully ascertain what items of income, deduction, apportionment or otherwise were used in arriving at said deficiency assessments.

7. That the Corporation Tax Bureau of the Department of Revenue, in authorizing the auditors of the Multistate Tax Commission to act as agents of the State of Montana, has unlawfully and illegally delegated to unauthorized persons the right to make tax examinations and audits on behalf of the State of Montana; and, further, in attempting to assert the deficiency assessments, Exhibit "A" hereto, has acted illegally and in excess of the authority granted by the Corporation License Tax Act of the State of Montana; has attempted to act under the purported authority of the Multistate Tax Compact (Section 84-6701, RCM) even though Congress has not authorized said Compact; and has attempted to force upon Taxpayer an election to appropriate and allocate income in accordance with Article IV of the Multistate Tax Compact even though Taxpayer has made no such election.

8. That, asserting against this Taxpayer said deficiency assessments (Exhibit "A" hereto) constitutes, as to this Taxpayer, a denial of due process of law and of equal protection of law in that this Taxpayer cannot ascertain from the deficiency assessments so made (Exhibit "A" hereto) upon what factors, items of income, apportionment and other matters the deficiency assessments are proposed;

and that by the refusal of the Corporation Tax Bureau of the Department of Revenue to furnish Taxpayer with a copy of said audits this Taxpayer cannot properly prepare its Protest and is thereby further denied due process of law and equal protection of law.

9. That Taxpayer is informed and believes that by said deficiency assessments (Exhibit "A" hereto) the State of Montana is attempting, contrary to law, to classify the Taxpayer and six other corporations, as one unitary business for Montana Corporation License Tax purposes contrary to Section 84-1509, RCM.

10. That Taxpayer is informed and therefore states that by said deficiency assessments (Exhibit "A" hereto) the State of Montana illegally and unlawfully attempts to allocate rents, royalties from real or tangible personal property, capital gains, interest, dividends, patent or copywright royalties and other income to the State of Montana although the same does not constitute business income, did not arise from transactions and activity in the regular course of Taxpayer's trade or business, and bears no reasonable relationship to the corporate activities of Taxpayer within the State of Montana or to the privilege of doing business within the State of Montana which is the subject of taxation under the Corporation License Tax Act of the State of Montana.

11. That Taxpayer is informed and therefore states that by said deficiency assessments (Exhibit "A" hereto) the State of Montana has purported to apply the provisions of Section 482, Internal Revenue Code, as to allocation of income and deduction to the Taxpayer and certain corporations, all without authority of law.

12. That Taxpayer is informed and therefore states that by said deficiency assessments (Exhibit "A" hereto) the State of Montana has illegally and unlawfully attempted to apply Section 78 of the Internal Revenue Code with respect to dividends received by Taxpayer or other corporations and to thereby include in gross income not only the actual dividends so received but also the foreign taxes deemed to have been paid by virtue of having received such dividends commonly known as "Gross-up of Dividends".

13. That Taxpayer is informed and therefore states that by such deficiency assessments (Exhibit "A") there has been an attempt to allocate to Montana, by some formula, income or claimed income which should not properly be so allocated and that there is no relationship between the property, payroll and sales of the Taxpayer and the income or claimed income attempted to be allocated to the State of Montana; and that not only has there been an attempt to allocate unitary income, but also income of a dual or multiform nature and upon a basis which does not recognize the actual activities in furtherance of the business of the Taxpayer.

14. That the illegal and unlawful attempt by the Corporation Tax Bureau to apportion to the State of Montana income as aforesaid constitutes an illegal and unlawful burden upon interstate commerce.

WHEREFORE, having protested said deficiency assessments (Exhibit "A" hereto), your Taxpayer prays that the Department of Revenue set aside all of such deficiencies and interest thereon and find and determine that the Taxpayer has properly reported for all of said years its income from sources within the State of Montana and properly paid a tax thereon and that said purported and pretended deficiencies are null and void,

OR, IN THE ALTERNATIVE, that the Department of Revenue: (a) order the Corporation Tax Bureau to furnish the Taxpayer with all copies of all audits and other information upon which said deficiency assessments (Exhibit "A" hereto) were made, including, without limitation, all audits and other information furnished by the Multistate

Tax Commission, and (b) that thereafter the Department of Revenue hold a hearing upon this Protest and that at such time the Taxpayer be allowed an opportunity to present additional evidence relating tc its tax liability.

Respectfully submitted this 4th day of April, 1973.

AMERICAN SMELTING & REFINING COMPANY,
a New Jersey corporation

Alexander J. Gillespie, Jr.
Vice President and General Counsel
120 Broadway
New York, New York 10005

Hughes, Bennett & Cain

/s/ By GEORGE T. BENNETT
George T. Bennett
406 Fuller Avenue
Helena, Montana 59601

Attorneys for Taxpayer

RECEIVED and FILED this 4th day of April, 1973.

DEPARTMENT OF REVENUE OF THE
STATE OF MONTANA

By Board of Equal
Its Vernon Miller, Secretary

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF MONTANA

• • • • • •

CAUSE NO. 13249

• • • • • •

MONTANA DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA,
Petitioner and Appellant,

-VS-

THE AMERICAN SMELTING AND REFINING COMPANY,
Defendant and Respondent.

• • • • • •

Respondent's Petition for Rehearing With Argument and Authorities Integrated Therein

Comes now the Defendant and Respondent, THE AMERICAN SMELTING AND REFINING COMPANY (ASARCO), and respectfully petitions the Supreme Court of the State of Montana for rehearing pursuant to Rule 34 of the Rules of Appellate Civil Procedure on the grounds and for the reasons that the decision of this Court made and entered on the 11th day of July, 1977 should be reversed, altered, amended or revised, because facts material to the decision and questions decisive of the case submitted by counsel were overlooked by the Court and that the decision is in conflict with express statutes and controlling decisions to which the attention of the Court was not directed.

[Material on pp. 2-19 of original document omitted.]

MATTER SHOULD BE REMANDED FOR CONSIDERATION OF SUBSTANTIAL CONSTITUTIONAL QUESTIONS RAISED BY PLEADINGS AND OVERLOOKED BY THE COURT

In its Protest to the Department of Revenue, ASARCO alleged that imposition of the asserted tax deficiency would

be contrary to the Commerce Clause and Due Process Clause of the Federal Constitution. (See Protest, pp. 2, 3, 4, 5 and 6). Because STAB and the District Court held that the proposed assessment was not proper as a matter of Montana statutory law, they never reached the Federal Constitutional issues in this case. Accordingly, even if this Court decides that the matters discussed above do not warrant reconsideration, the case should still be remanded to permit full development of the facts and legal arguments bearing on the important constitutional issues raised by the Protest.

In particular, the case should be remanded for the following reasons:

1. *Status of the Multistate Tax Compact:* The audit giving rise to the proposed tax adjustment in this case was conducted by auditors of the Multistate Tax Commission, purporting to act under the authority of the Multistate Tax Compact. (See STAB Findings, Paragraph 6; District Court Findings, Paragraph 6; Petitioner-Appellant's Brief, p.3). The validity of the Multistate Tax Compact under the Federal Constitution is now at issue in *U.S. Steel Corp.* v. *Multistate Tax Commission* (U.S. Sup.Ct. Dkt. No. 76-635, October Term, 1976) which is awaiting oral argument in the United States Supreme Court. This is a class action by U.S. Steel on behalf of all corporations similarly situated which would include ASARCO. The Montana taxing authorities were expressly made a party (J. Morley Cooper, as Chairman of the State Board of Equalization). For this Court's convenience, a copy of the appellant's brief on the merits in the *U.S. Steel* case is attached as Exhibit "B" to this petition. If the U.S. Supreme Court holds that the Multistate Tax Compact is unconstitutional, grave questions will arise as to the validity of the audit conducted in this case by the Multistate Tax Commission. Accordingly, final judgment should not be entered in the present case until STAB and the court below have had an opportunity to consider the impact of the U.S. Supreme Court's decision in the pending *U.S. Steel* case.

2. *Taxation of Passive Income from Property Outside Montana.* Grave constitutional questions are raised by this Court's decision that Montana has jurisdiction to tax dividends, royalties, rents, interest, and gains on stock sales realized by ASARCO from transactions occurring *wholly* outside the State. The U.S. Supreme Court has held that the interstate operations of a foreign corporation may be subjected to state taxation only if "the levy is not discriminatory and is properly apportioned to *local activities* within the taxing state forming sufficient nexus to support the same". *Northwestern Cement Co. v. Minnesota,* 358 US 450, 452 (1959) (emphasis added). It is clear that "the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere". *Connecticut General Life Insurance Co. v. Johnson,* 303 US 77, 80-81 (1938). "When, as in this case, there are different taxing jurisdictions, . . . and the question is necessarily one of apportionment, evidence may always be received to show that a state has applied a method, which, albeit fair on its face, operates so as to reach profits *which are in no just sense attributable to transactions within its jurisdiction." Hans Rees' Sons v. North Carolina ex rel. Maxwell,* 283 U.S. 123, 134 (1931) (emphasis added).

Applying these principles, at least two State Supreme Courts have held that dividend income received by a corporation in one state from subsidiaries operating entirely in other states or foreign jurisdictions may not constitutionally be included in the corporation's apportionable net income for purposes of computing its income tax liability in the former state. *Gulf Oil Corp. v. Clayton,* 147 SE2 522 (Sup.Ct. N.C. 1966); *Square D Company v. Kentucky Board of Tax Appeals,* 415 SW2 594 (Ct. of App. Ky. 1967). Similar considerations led Judge (later Mr. Justice)

Cardozo to hold that the Federal Constitution precluded New York from taxing a corporation doing business in that state on any part of the interest income it earned on bonds held outside the state. *People ex rel. Alpha Portland Cement Co. v. Knapp*, 129 NE 202 (Ct. of App. N.Y. 1920).

At page 24 of the Department's Brief, it is stated:

> "Montana *could not constitutionally* tax ASARCO if ASARCO did not have income from sources within the state." (Emphasis supplied.)

Also at pages 48 and 49 of the Department's brief appears the following:

> "Since the six corporations being combined with ASARCO are not subject to the jurisdiction of Montana, *in no way could Montana constitutionally* consolidate ASARCO with its wholly-owned subsidiaries under Section 84-1509 R.C.M., 1947." (Emphasis supplied.)

This Court, at page 13 of its opinion, states that the case of *Coca Cola Company v. Department of Revenue*, 271 OR 517, 533 P2 788, is "*on all fours* with the instant case". This clearly indicates the Court's misunderstanding of this issue. In the *Coca Cola* case, both the parent corporation and its subsidiary *were doing business* in Oregon, were subject to Oregon's jurisdiction, were deriving income from Oregon sources, and, accordingly, *both had filed returns* with Oregon (pp. 789 and 790 Pac.Rpts.). This is far different from the situation with ASARCO where the Department admits that none of the affiliated corporations are subject to the jurisdiction of the State of Montana and that "in no way could Montana constitutionally *consolidate* ASARCO with its wholly-owned subsidiaries . . .".

How can this Court square its statement that:

> "DOR clearly has the authority to adopt rules and regulations as to apportionment of corporate income *without regard to source*." (Page 7.)

with the Department's admission that to do so would be unconstitutional (P. 24 of Appellant's brief)?

While the U.S. Supreme Court has not yet passed on the constitutionality of applying state income tax apportionment statutes to passive income realized from out-of-state property, the foregoing state decisions make it clear that any attempt by a state to reach such income poses serious constitutional questions, at the very least. As stated in a recent leading article, which the Department cited with approval in connection with another point in its brief in this Court (p. 39):

> ". . . the specific allocation of investment income is at least logically consistent with the proposition that a state should only tax income from in-state sources. Certainly, it would not square with the underlying rational of the Supreme Court cases to subject such income to formulary apportionment." *

Since STAB and the District Court found it unnecessary to reach this issue in their original consideration of the case, the case should be remanded and the record should be reopened to determine whether, on the facts of this case, the Montana statute as interpreted by this Court will result in "extra-territorial values being taxed". See *Butler Bros. v. McColgan*, 315 U.S. 501, 507 (1942).

3. *Inclusion of Subsidiaries in the Tax Base.* As interpreted by this Court, the Montana statute means that the "net income and apportionment factors of six of

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* Rudolph, "State Taxation of Interstate Business: The Unitary Business Concept and Affiliated Corporate Groups", 25 Tax Law Rev. 171, 185 (1970).

ASARCO's wholly owned subsidiaries must be included in ASARCO's computation of apportionable income," even though the six subsidiaries "are clearly separate and distinct from ASARCO". (Slip Opinion, p. 11). Since the record establishes that none of the six subsidiaries has assets or business activities of *any* kind in Montana, inclusion of the subsidiaries' net income in the Montana tax base is obviously subject to serious challenge on constitutional grounds. See e.g., *Interstate Finance Co. v. Wisconsin Department of Taxation,* 137 NW2 28 (Sup. Ct. Wis. 1965); *People ex rel. Alpha Portland Cement Co. v. Knapp, supra.* See also, State Taxation of Interstate Commerce, H. Rep. No. 1480, 88th Cong., 2d Sess. 245 (1964).

Those who seek to defend the constitutionality of the result reached by this Court in the present case generally do so by asserting that the state is not taxing the income of the out-of-state subsidiaries, but is merely using that income to measure the amount of tax properly payable by the local corporation on its income. See, e.g., Keesling, "A Current Look at the Combined Report and Uniformity in Allocation Practices", 42 Journal of Taxation 106, 108 (1975). However, "[w]hen passing on the constitutionality of a state taxing scheme, it is firmly established that . . . [the U.S. Supreme Court] concerns itself with the *practical operation* of the tax, that is, substance rather than form". *American Oil Co. v. Neill,* 380 U.S. 451, 455 (1965) (emphasis added). Regardless of how the taxing structure approved by this Court is described *verbally,* it can have the *practical effect* of imposing tax on the out-of-state income of separate companies having *no* contact of *any* kind with Montana. Because STAB and the District Court concluded that the Montana statute did not permit a combined calculation, they did not have to reach the constitutional question. The case should therefore be remanded for a finding as to whether or not the "practical operation" of the

statute, as interpreted by this Court, is to impose a constitutionally impermissible tax on the income of out-of-state corporations which are admittedly not subject to Montana's taxing jurisdiction in their own right.

[Material on pp. 26-27 of original document omitted.]

Respectfully submitted this 1st day of August, 1977.

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APPENDIX H

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. 13249

MONTANA DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, *Petitioner & Appellant,*

-VS-

THE AMERICAN SMELTING AND REFINING COMPANY, *Defendant & Respondent.*

Appellant's Objections To Respondent's Petition for Rehearing

• • • •

COMES NOW the Petitioner and Appellant, THE MONTANA DEPARTMENT OF REVENUE (Department) and objects to AMERICAN SMELTING AND REFINING COMPANY'S (ASARCO) Petition for rehearing filed herein on August 1, 1977. For convenience of the Court, the Department has followed point by point the Petition of the Respondent, and has also integrated as to each point raised, its argument and authorities.

Petitions for rehearing are governed by Rule 34, Rules of Appellant Civil Procedure, and the grounds upon which rehearing petitions are granted are extremely limited.

> "A petition for rehearing may be presented upon the following grounds and *none other*: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the Court or that the decision is in conflict with an express statute or controlling decision to which the attention of the Court was not directed."

It is on those grounds and none other upon which this Court could order a rehearing in this matter. It is submitted by the Department, that this matter was thoroughly

briefed by all parties, that the Court did not overlook any facts or questions submitted by counsel, and that the case is not in conflict with any statute or controlling decision.

[Material on pp. 2-12 of original document omitted.]

ISSUE VIII

MATTER SHOULD NOT BE REMANDED FOR CONSIDERATION OF SUBSTANTIAL CONSTITUTIONAL QUESTIONS RAISED BY PLEADINGS AND OVERLOOKED BY THE COURT.

To begin with, the Department objects to the taxpayer now requesting that additional issues should be decided in this case which were not raised at the original hearing before this Court. Attached as exhibit C to this objection is the taxpayer's proposed Findings, Conclusions and Order submitted to the Department of Revenue at the initial hearing on this matter. The taxpayer did not include any provision in its findings or conclusions as to the constitutionality of the acts of the Department of Revenue.

Also attached as Exhibit D are the Findings of Fact and Conclusions of Law and Order entered by the State Tax Appeal Board, which were verbatim the proposed Findings of Facts and Conclusions of Law submitted by the taxpayer, and they again do not refer to any unconstitutional aspect of the case.

Finally, in the Findings of Fact, Conclusions of Law and Order of the District Court, proposed by the taxpayer, attached as Exhibit E which were adopted verbatim by the Court, no where did the taxpayer raise the constitutional questions it now seeks to interpose. The taxpayer was not precluded at any stage from the hearing before the Department of Revenue to the hearing in the District Court, from raising the constitutional questions. The taxpayer did not raise those issues at any stage in the proceedings, and clearly did not raise those issues before this Court. This Court has repeatedly stated that it will not on

a motion for rehearing consider questions not originally raised in the action. *Mares vs Mares et al,* 60 M.36, 199P. 267.

> "However, this is the first time that this point has been presented, urged or argued, and it is the settled rule that this Court will not, on an application for rehearing, consider grounds for reversal not presented upon the original hearing." P. 55

It is the position of the Department, that even if these matters had been raised previously, which we contend they were not, they were clearly not raised in the original hearing in this Court on this matter and cannot now be raised by the taxpayer.

Sub-Section 1
Status of the Multi-State Tax Compact

The taxpayer asserts that because the audit was performed by the Multi-State Tax Commission, and the validity of the compact is at issue in the United States Supreme Court, that it effects the decision in some way. In opposition, we cite to the Court the brief of the taxpayer filed in opposition to the motion of the Multi-State Tax Commission to participate in this matter as amicus curiae, dated May 12, 1976. In that brief, the taxpayer takes a somewhat different position.

> "It is true that the audit which formed this basis of this litigation was conducted by the Multi-State Tax Commission. *But this act has no bearing whatsoever on the issue on appeal herein.* There never was any question in this case as to the audit information. Thus, the issue on appeal does not relate to the validity of the mechanics of the audit. Rather, the issue on the Department's appeal concerns the time at which the principals of UDITPA became effective in Montana. This issue, ASARCO submits, is solely and exclusively

> one of Montana law, in which the Multi-State Tax Commission has not one bit of interest with respect to which there is no need whatsoever to 'uniform interpretation and application by the member states' of the Multi-State Tax Commission." (Emphasis supplied)

The Department could not have have rebutted the argument any better than the taxpayer has.

Sub-Section 2

Taxation of Passive Income from Property Outside Montana

The Respondent begins this argument with the following statement:

> "Grave constitutional questions *are raised* by this Court's decision that Montana has jurisdiction to tax dividends, royalties, rents, interest and gains on stock sales realized by ASARCO from transactions occurring wholly outside the state." p. 21.

These grave constitutional questions have never been presented to this Court prior to this petition for hearing. If this had been a consideration of the taxpayer, these cases could have been briefed and argued prior to this late date. As the *Mares* case *supra* indicates, it is not proper in a petition for rehearing to raise new issues.

On page 23 of the Respondent's petition, beginning at line 13, it is again clear the taxpayer's misunderstanding of the issue of combination. The Court was quite correct in ruling that the case of *Coca-Cola Co. vs. Department of Revenue,* 271 OR 517, 533 P.2d 788, is on all fours with the instant case. The question there involved the unitary operation of Coca-Cola and its subsidiaries. The situation is exactly the same with the taxpayer and the subsidiaries

which were combined, because they were conducting a unitary operation.

Finally, it is incorrect for the taxpayer to indicate that STAB and the District Court found it unnecessary to reach these new constitutional issues, because the fact simply is, that the issues were in fact never presented to those tribunals for their decision. More importantly, they were not presented to this Court by the taxpayer, prior to this time.

Sub-Section 3
Inclusion of Subsidiaries in the Tax Base

Sub-Section 3 is a rehash of sub-section 2 of this issue. The taxpayer has not cited any case whereby the acts of the Department as upheld by this Court are unconstitutional. Rather the taxpayer is asking this Court to give them another opportunity to reargue their case on different grounds. The Department contends that these issues were not raised before STAB or the District Court and therefore the case cannot now be remanded for a determination of these new issues.

[Material on pp. 15-16 of original document omitted.]

CONCLUSION

A careful review of the petition, clearly indicates that the taxpayer has not raised any issue which comes within the parameter of Rule 34 Montana Rules of Appellate Procedure. Of the first eight issues, if they were raised they were discussed by the parties in the briefs and by this Court in the opinion, and are laid to rest; if they were not raised, they cannot be argued now. Of the constitutional issues, these were not raised in the prior proceedings; they were clearly not raised in the original hearing before this Court; the taxpayer had every opportunity to argue at the prior stages the constitutional question, and failed to do so. It is improper at this stage of the proceedings to

grant a rehearing to hear issues not previously raised. Finally, the Court's opinion did not overlook any issues raised; the deficiency assessment will not include any amount represented by "gross up"; the question of the gain on the sale of stock of General Cable and Revere Copper was clearly considered by the Court and found to be business income.

THEREFORE, the Department respectfully requests that the petition of the Respondent for rehearing be denied on all grounds.

DATED this 4th day of August, 1977.

Respectfully submitted,

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